MTD Capital Bhd v Tan Sri Dr Azmil Khalili bin Khalid

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-160–04 OF 2019
ONG CHEE KWAN JC
11 JUNE 2019

Civil Procedure — Transfer of action — High Court to High Court — Defendant filed application for plaintiff's originating summons to be 'listed' with defendant's writ action — Both actions filed in High Court of Kuala Lumpur — Whether High Court judge had jurisdiction to transfer proceedings to another court under O 57 and O 4 of the Rules of Court 2012 — Whether defendant satisfied prerequisites under O 4 r 1(1) of the Rules of Court for actions to be consolidated — Courts of Judicature Act 1964 s 20 — Rules of Court 2012 O 4 & O 57

This was an application by the defendant via encl 5 for the plaintiff's originating summons ('the OS action') to be listed with the defendant's writ action ('the writ action') whereby both actions were filed in the High Court of Kuala Lumpur. Through the OS action which was filed in NCC2 court, the reliefs sought was for the historical accounts related to investments that had been made by the defendant under a Maybank facility for the benefits of the plaintiff ('Maybank trust'). On the other hand, the reliefs sought for in the writ action which was filed in NCC5 court related to the defendant's rights under the Maybank trusts as well as two other trusts namely the CIMB trust and supplemental trust to be exonerated and indemnified and to resign as trustee with the consequential accounts to be taken following the closing of the trusts. The question raised in the present action was related to the power of the judge of the High Court to transfer proceedings to another court under O 57 and O 4 of the Rules of Court 2012 ('the ROC'). The main issue was whether the defendant had satisfied the prerequisites under O 4 r 1(1) of the ROC for an order to have the OS action and the writ action to be consolidated.

Held, dismissing encl 5 with costs of RM5,000:

(1) Section 20 of the Courts of Judicature Act 1964 dealt with the powers of the Chief Judge to issue directions, be it of a general or particular nature relating to the distribution of cases among the judges of the High Court. It was a power that was exercised unilaterally by the Chief Judge. The directions issued were part of the administrative functions of the Chief Judge. This was distinct from an application that was made by a party to the judge of the High Court to transfer proceedings from one court to another (see paras 19 & 34).

(2) It was settled that under O 57 r 1 of the ROC, a judge sitting in the High Court at Kuala Lumpur had the jurisdiction and power to order any proceedings before him to be transferred to another High Court in Malaya of coordinate jurisdiction. 'Coordinate jurisdiction' was defined in *Black's Law Dictionary* to mean 'that which is possessed by courts of equal rank, degree, or authority, equally competent to deal with the matter in question, whether belonging to the same system or different systems; concurrent jurisdiction'. Applying the aforesaid definition, there was no doubt that a court within a particular branch of the High Court in Malaya was a court of 'co-ordinate jurisdiction' to another court located within the same branch of the High Court (see paras 28 & 30–31).

(3) A plain reading of O 4 r 1 of the ROC would permit a judge of the High Court to make an order for two or more causes or matters that were pending to be consolidated even if these causes or matters were pending in different courts as long as the requisite tests were satisfied. Although there was no mention in O 4 r 1(1) of the ROC of any power to transfer the causes or matters from one court to another court, the power to transfer was consequential from the order for consolidation (see paras 41–42).

(4) The defendant's application to have the OS action to be 'listed' with the writ action was premised on O 4 r 1(1) of the ROC. Order 4 r 1 of the ROC stipulated the conditions to be satisfied for the court to order any causes or matters to be consolidated. It did not provide for an order to 'list' any causes or matters at all, as such, the defendant's application was technically flawed (see paras 65–66).

(5) There was no real basis for the OS action and the writ action to be consolidated because the questions of law or facts were different and the relevant transaction or series of transactions giving rise to the reliefs claimed were also different. The court found that the defendant had not fulfilled any of the conditions described in O 4 r 1 of the ROC (see paras 67 & 75).

(6) The OS action could be determined quickly as it proceeded by way of affidavits and did not require oral evidence adduced at a trial as in the writ action. There would be no saving of time and costs by consolidating the two actions. Further, there was no possibility of inconsistent judgments if the OS action was to be heard separately and independent of the writ action since the issues and the reliefs claimed were different and distinct. The plaintiff's instituting of the OS action without the knowledge of the writ action could not be an abuse of process because the two actions were clearly distinct (see paras 77–78 & 80).

[Bahasa Malaysia summary

Ini adalah permohonan oleh defendan melalui lampiran 5 agar saman pemula plaintif ('tindakan SP') untuk disenaraikan dengan tindakan writ defendan ('tindakan writ') di mana kedua-dua tindakan tersebut difailkan di Mahkamah Tinggi Kuala Lumpur. Melalui tindakan SP yang difailkan di mahkamah NCC2, perintah yang diminta adalah berkenaan dengan sejarah akaun yang berkaitan dengan pelaburan yang telah dibuat oleh defendan di bawah kemudahan Maybank untuk kepentingan plaintif ('amanah Maybank'). Sebaliknya, perintah yang diminta di dalam tindakan writ yang difailkan di mahkamah NCC5 adalah berkaitan dengan hak defendan di bawah amanah Maybank serta dua amanah lain iaitu amanah CIMB dan amanah tambahan agar dikecualikan dan ditanggung rugi dan hak defendan untuk meletakkan jawatan sebagai pemegang amanah dengan akaun konsekuen yang akan diambil setelah penutupan amanah-amanah tersebut. Persoalan yang dibangkitkan dalam tindakan ini adalah berkaitan dengan kuasa hakim Mahkamah Tinggi untuk memindahkan prosiding ke mahkamah lain di bawah A 57 dan A 4 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Isu utama adalah sama ada defendan telah memenuhi prasyarat di bawah A 4 k 1(1) KKM bagi membolehkan tindakan SP dan tindakan writ tersebut disatukan.

Diputuskan, menolak lampiran 5 dengan kos RM5,000:

(1) Seksyen 20 Akta Mahkamah Kehakiman 1964 memperuntukkan tentang kuasa Hakim Besar untuk mengeluarkan arahan, sama ada secara umum atau khusus yang berkaitan dengan pembahagian kes di kalangan hakim-hakim Mahkamah Tinggi. Ia adalah satu kuasa yang dilaksanakan secara *unilateral* oleh Hakim Besar. Arahan yang dikeluarkan adalah sebahagian dari fungsi pentadbiran Hakim Besar. Ini adalah berbeza daripada permohonan yang dibuat oleh sesuatu pihak kepada hakim Mahkamah Tinggi untuk memindahkan prosiding dari satu mahkamah kepada yang lain (lihat perenggan 19 & 34).

(2) Tidak dapat dipersoalkan bahawa di bawah A 57 k 1 KKM, hakim yang bersidang di Mahkamah Tinggi di Kuala Lumpur mempunyai bidang kuasa dan kuasa untuk memerintahkan apa-apa prosiding di hadapannya untuk dipindahkan ke Mahkamah Tinggi lain di semenanjung Malaysia yang setara bidang kuasa. 'Setara bidang kuasa' ditakrifkan dalam *Black's Law Dictionary* bermaksud 'that which is possessed by courts of equal rank, degree, or authority, equally competent to deal with the matter in question, whether belonging to the same system or different systems; concurrent jurisdiction'. Dengan menggunapakai takrifan di atas, tidak ada keraguan bahawa mahkamah di dalam cawangan tertentu Mahkamah Tinggi di semenanjung Malaysia adalah mahkamah 'setara bidang kuasa' dengan mahkamah lain yang terletak di dalam cawangan yang sama di Mahkamah Tinggi (lihat perenggan 28 & 30–31).

(3) Bacaan secara biasa A 4 k 1 KKM akan membenarkan seorang hakim Mahkamah Tinggi membuat suatu perintah untuk dua atau lebih kausa atau tindakan yang belum selesai disatukan walaupun kausa atau tindakan tersebut belum selesai di mahkamah yang berbeza selagi ujian yang diperlukan telah dipenuhi. Walaupun tidak disebutkan di dalam A 4 k 1(1) KKM berkenaan apa-apa kuasa untuk memindahkan kausa-kausa atau tindakan-tindakan dari satu mahkamah ke mahkamah lain, kuasa untuk memindahkan adalah akibat daripada perintah untuk penyatuan (lihat perenggan 41–42).

(4) Permohonan defendan agar tindakan SP 'disenaraikan' dengan tindakan writ adalah didasarkan pada A 4 k 1(1) KKM. Aturan 4 k 1 KKM menetapkan syarat-syarat yang perlu dipenuhi sebelum mahkamah boleh memerintahkan apa-apa kausa atau tindakan disatukan. Ia tidak menyatakan tentang perintah untuk 'menyenaraikan' sebarang kausa atau tindakan sama sekali, oleh itu permohonan defendan secara teknikalnya adalah tidak tepat (lihat perenggan 65–66).

(5) Tidak terdapat asas yang nyata bagi membolehkan tindakan SP dan tindakan writ untuk disatukan kerana persoalan undang-undang atau fakta bagi kedua-dua tindakan adalah berbeza dan transaksi yang berkaitan atau siri transaksi yang membawa kepada perintah yang dituntut juga berbeza. Mahkamah mendapati bahawa defendan tidak memenuhi mana-mana syarat yang dinyatakan dalam A 4 k 1 KKM (lihat perenggan 67 & 75).

(6) Tindakan SP boleh ditentukan dengan cepat kerana ia boleh diteruskan melalui afidavit dan tanpa pengemukaan keterangan lisan dalam perbicaraan seperti dalam tindakan writ. Tidak akan berlaku penjimatan masa dan kos dengan menyatukan kedua-dua tindakan. Selanjutnya, tidak ada kemungkinan penghakiman yang tidak konsisten jika tindakan SP didengar secara berasingan dan bebas dari tindakan writ tersebut kerana isu dan perintah yang dituntut adalah berbeza dan berasingan. Pemfailan tindakan SP oleh plaintiff tanpa pengetahuan tentang tindakan writ tidak menjadi penyalahgunaan proses kerana kedua-dua tindakan jelas berbeza (lihat perenggan 77–78 & 80).]

Cases referred to

Alliance Bank (M) Bhd v Portola Closure Manufacturing (M) Sdn Bhd and Others [2007] MLJU 206; [2007] 1 LNS 112, HC (refd)

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244, FC (refd)

Chong Siew Choong v PP [1996] 5 MLJ 65, HC (refd)

Five Star Heritage Sdn Bhd v Nai Ninn Sararaksh & Anor [2017] MLJU 1666, HC (refd)

Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd &

Anor [2016] 3 MLJ 553, FC (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd [2019] 2 MLJ 816, CA (refd)
Lai Kim Loi v Dato Lai Fook Kim & Anor [1989] 2 MLJ 290, SC (refd)
Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd and ors [2010] MLJU 1854, HC (refd)
Osaka Resources Sdn Bhd & Ors v Foo Holdings Sdn Bhd and another appeal [2014] 1 MLJ 461, CA (refd)
Penang Port Commission v Kanawagi s/o Seperumaniam [2008] 6 MLJ 686, CA (refd)
Premier Model (M) Sdn Bhd v Phileo Promenade Sdn Bhd & Anor [2000] 1 MLJ 364, HC (refd)
Shankar a/l Ram Pohumall @ Shankar RP Asnani & Anor v Jeffery Law Siew Su & Ors [2010] 4 MLJ 788, HC (refd)
Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)
Tang Kwor Ham & Ors v Pengurus Danaharta Nasional Bhd & Ors [2006] 5 MLJ 159, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 20, 25, 25(2), Schedule, para 12
Rules of Court 2012 O 4, O 4 r 1, 1(1), (1)(c), (3), O 57, O 57 r 1, 1(4)
Rules of the High Court 1980

Teh Meng Teck (Cheah Teh & Su) for the plaintiff.
Logan Sabapathy (Chong Hau Yean and Vivian Oh with him) (Gopi Seshadari) for the defendant.

Ong Chee Kwan JC:

INTRODUCTION

[1] This decision arises from an application to transfer proceedings filed under an originating summons in this court to another court within the same division of the High Court of Malaya at Kuala Lumpur to be consolidated with a writ action filed in the latter court ('encl 5').

[2] The application raises the question as to the power of the judge of the High Court to transfer proceedings to another court under O 57 and O 4 of the Rules of Court 2012 ('the Rules').

A BACKGROUND

[3] Enclosure 5 was originally filed under O 57 r 1 and O 4 r 1 of the Rules. However, the defendant subsequently abandoned the reference to O 57 r 1 and pinned his application solely on O 4 r 1.

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[4] The object of the defendant's application as prayed for in encl 5 is to have this present action under Kuala Lumpur High Court Originating Summons No WA-24NCC-160–04 of 2019 filed in NCC2 Court ('the OS action') to be 'listed' with the Kuala Lumpur High Court Suit No WA-22NCC-164–03 of 2019 filed in NCC5 Court ('the writ action') and for the judge having conduct of the two matters to decide on the appropriate directions pursuant to O 4 r 1.

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[5] The defendant is seeking for either the OS action in NCC2 Court to be transferred to NCC5 Court to be heard together with the writ action or for the writ action in NCC5 Court to be transferred over to NCC2 Court to be heard together with the OS action.

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[6] Subsequent to filing encl 5, learned counsel of the defendant took the view that O 57 r 1 of the Rules is not applicable for the intended transfer as he believed that the said provisions are applicable only where the transfer relates to proceedings in one branch of the High Court to another branch of the High Court, for example. where an action filed in the High Court at Kuala Lumpur is sought to be transferred to the High Court at Johor Baru.

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[7] According to learned counsel of the defendant, O 57 r 1 does not apply if the intended transfer is from one court to another court *within* the same branch of the High Court. In the instant case, the proposed transfer of the OS Action in NCC2 Court to NCC5 Court to be heard together with the writ action or vice versa would be an internal transfer within the Commercial Division of the High Court at Kuala Lumpur.

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[8] Hence, to get around the 'problem', the defendant now relies on O 4 r 1. Learned counsel of the defendant submitted that there are common question of law or facts that arises in both the OS action and the writ action and or that the rights to reliefs claimed in both the OS action and the writ action are in respect of or arise out of the same transaction or series of transactions. Alternatively, it was contended that for 'some other reason' it is desirable to make an order under this rule. These are the tests stipulated in O 4 r 1 of the Rules for the consolidation of two or more causes or matters.

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[9] Once the defendant satisfies any one of the tests, the court can then make the order under O 4 r 1 to have the OS action to be 'listed' with the writ action so that both the matters can be managed and heard before a single judge. The

word 'list' is used instead of 'transfer' because learned counsel of the defendant took the view that a 'transfer' is only permitted between different branches of the High Court of Malaya and not between courts within the same branch. A

[10] Learned counsel of the plaintiff opposed the application under O 4 r 1 as O 4 r 1 does not provide for the 'listing' of one cause or matter with another cause or matter. The provisions are for the consolidation of two or more causes or matters. Accordingly, the defendant's application to 'list' the OS action and the writ action together under O 4 r 1 is inherently flawed. B

[11] Further, by seeking an order for the OS action to be 'listed' with the writ action, learned counsel of the plaintiff contended that the defendant is seeking a transfer of proceedings from one court to another court within the same branch of the High Court. Learned counsel of the plaintiff submitted that this court has no power to order any transfer of proceedings from one court to another within the same branch of the High Court. C D

[12] In support of this contention, learned counsel of the plaintiff relied on s 20 of the Courts of Judicature Act 1964 ('the CJA') which provides thus: E

> Section 20 Distribution of Business
>
> The distribution of business among the Judges of the High Court shall be made in accordance with such directions, which may be of a general or particular nature, as may be given by the Chief Judge.

[13] Learned counsel of the plaintiff referred to the decision by Abdul Malik Ishak J in *Chong Siew Choong v Public Prosecutor* [1996] 5 MLJ 65 where at pp 70–71, His Lordship opined: F

> Section 20 of the Courts of Judicature Act 1964 (Act 91) ('the Act') enacts that:
>
> > The distribution of business among Judges of the High Court shall be made in accordance with such directions, which may be of a general or particular nature, as may be given by the Chief Judge.
>
> A 'Chief Judge' is defined under s 3 of the Act to mean the Chief judge of the High Court in Malaya. In my opinion, s 20 of the Act gives an absolute power to the Chief Judge to distribute 'business' among judges of the High Court in accordance with the directions which he may give of a general or particular nature. The word 'business' employed in the context of s 20 of the Act must necessarily refer to the 'cases' filed before the High Courts as the hearing of such cases are the only 'business' conducted by these High Courts. It is a correct approach to adopt when construing an Act of Parliament by construing the intention as expressed in the Act itself. Put differently, it is appropriate to say that the function of the court is to interpret an Act 'according to the intent of them that made it' and the intention must be deduced from the language used : per Parker CJ in *Capper & Anor v Baldwin* [1965] 2 QB 53 at p 61. In my judgment, the words employed in s 20 of the Act are by themselves G H I

A precise and unambiguous and, consequently, my job is simply to expound those words in the ordinary and natural sense.

... in construing s 20 of the Act, I arrived at the inescapable conclusion that only the Chief Judge could direct me to take and dispose of Criminal Trial No 45–7 of 95 from J1 and, without the Chief Judge's direction on this point, I will not encroach into J1's territory, so to speak. For fear of repetition. I lay stress on the fact that the Chief Judge has that overriding power and it is also his prerogative to transfer Criminal Trail No 45–7 of 95 to J3. I have no powers of the like nature. Accordingly, I refused to grant the prayers in encl 2.

C **[14]** Thus, it is submitted that I do not have the power to transfer the OS action from this court to be consolidated with the writ action that is filed in NCC 5 Court. Such power is vested only in the Chief Judge of the High Court of Malaya.

D **[15]** It is not possible to rely on the inherent powers of the High Court to make an order for such a transfer as in the same case, His Lordship Abdul Malik Ishak J at p 73 also held that the inherent powers of the High Court cannot be exercised to override or circumvent the express provisions of the law.

E **[16]** It seems from the submission by learned counsel of the plaintiff that he shared a similar view with learned counsel of the defendant that O 57 r 1 applies *only* in relation to a transfer of an action from a court from one branch of the High Court to a court from another branch of the High Court.

F **[17]** In fact, learned counsel of the Plaintiff went further to submit that O 4 r 1 of the High Court applies only where the causes or matters that are to be consolidated are causes or matters that are already pending before the judge of the High Court.

G **[18]** With respect, I do not agree with the interpretations of learned counsel on the lack of power on the part of the High Court judge to transfer proceedings in one court to another court within the same branch of the High Court. I also do not accept that O 4 r 1 ought to be confined to such narrow H application as contended by learned counsel of the plaintiff.

ANALYSIS OF THE COURTS OF JUDICATURE ACT

I **[19]** Reading s 20 of the CJA, one will immediately note that the provision deals with the powers of the Chief Judge to issue directions, be it of a general or particular nature relating to the distribution of cases among the judges of the High Court. It is a power that is exercised unilaterally by the Chief Judge. The directions issued are part of the administrative functions of the Chief Judge. This is distinct from an application that is made by a party to the judge of the

High Court to transfer proceedings from one court to another.

[20] In considering such an application, the judge relies on the powers of the High Court as provided in s 25 of the CJA which states:

> Section 25
>
> 25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have additional powers set out in the Schedule.
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[21] In the Schedule under s 25(2) of the CJA, para 12 deals with 'Transfer of Proceedings' and it provides:

> 12 Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof.
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court'

[22] 'Court' as defined in s 3 of the CJA means 'the Federal Court, the Court of Appeal or the High Court, as the case may require' and 'High Court' means 'the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require'.

[23] Based on the aforesaid, it is immediately clear that a judge of the High Court has the power to transfer any proceedings before him to another court.

[24] In *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268, Lim Beng Choon J held that:

> a High Court located at Penang or Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state.

[25] In *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553, the Federal Court held that the power to transfer proceedings to another court as stated in para 12 of the Schedule of the CJA should be read in the light of s 3 of the CJA where the 'local jurisdiction'

A is defined to mean in the case of the High Court in Malaya, the territory comprised in the states of Malaya, and in the case of the High Court of Sabah and Sarawak, the territory comprising of the states of Sabah and Sarawak.

B **[26]** The Federal Court held that the power to transfer any proceedings should be confined to transfer within a particular local jurisdiction and not between two local jurisdictions. Jurisdiction is a limiting factor to the power under para 12 of the Schedule of the CJA. Accordingly, a judge in a High Court in Malaya will not have the jurisdiction to order a transfer of proceedings from his court to the High Court of Sabah and Sarawak.

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[27] The Federal Court also considered O 57 r 1(4) of the Rules (this Order was only introduced in 2016 in the Rules and was not in existence in the Rules of the High Court 1980) which speaks of a judge in a High Court making an order to transfer any proceedings from the High Court to another High Court D of 'co-ordinate jurisdiction' and held that the context must be confined to the respective territorial jurisdiction of two High Courts, namely that of Malaya on the one hand and Sabah and Sarawak on the other. The High Courts within the States of Malaya are each of co-ordinate jurisdiction as are each of the High Courts in the States of Sabah and Sarawak.

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[28] Therefore, it is settled that under O 57 r 1, a judge sitting in the High Court at Kuala Lumpur has the jurisdiction and power to order any proceedings before him to be transferred to another High Court in Malaya of co-ordinate jurisdiction, for example, the High Court of Malaya at Penang. F

[29] Learned counsel of both parties in this case however held the view that the words 'court of co-ordinate jurisdiction' do not extend to a court within a particular branch of the High Court, as in the present case where the intention G was to seek a transfer of the OS Action filed in NCC2 Court to be heard together with the writ action in NCC5 Court which is within the same Commercial Division of the High Court of Malaya at Kuala Lumpur.

[30] 'Coordinate jurisdiction' is defined in *Black's Law Dictionary* to mean H 'that which is possessed by courts of equal rank, degree, or authority, equally competent to deal with the matter in question, whether belonging to the same system or different systems; concurrent jurisdiction'.

[31] Applying the aforesaid definition, there is no doubt that a court within I a particular branch of the High Court in Malaya is a court of 'co-ordinate jurisdiction' to another court located within the same branch of the High Court.

[32] It would be incongruous if a judge sitting in a court located in the High

Court of Malaya at Kuala Lumpur has the power to order a transfer of any proceedings in his court to another court sitting in another branch of the High Court of Malaya but has no such power to make such an order to transfer proceedings to another court that is located within the very same branch.

[33] Under O 57 r 1 of the Rules, the power to transfer proceedings to another court of co-ordinate jurisdiction is only to be exercised 'on an application by any party'.

[34] As stated above, this is different from the distribution of cases among the judges of the High Court pursuant to such directions as may be given by the Chief Judge under s 20 of the CJA. In my mind, s 20 of the CJA does not at all mean that a High Court judge has no power at all to order a transfer of proceedings to another court when such an application is made before him under O 57 or O 4 of the Rules.

[35] In *Chong Siew Choong v Public Prosecutor* [1996] 5 MLJ 65, the learned judge's attention was not drawn to para 12 of the Schedule to the CJA. Also, O 57 of the Rules was not in existence at that time.

[36] Learned counsel of the plaintiff had referred to the case of *Tang Kwor Ham & Ors v Pengurus Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 159. However, this was a case where the learned High Court judge was asked to 'direct, find or get another judge from another state to hear the double recusal applications and substantive motion'. It was not an application made under O 4 of the Rules. It was clearly not within the power of the High Court judge to make the direction as asked.

[37] Now, can a party rely on O 4 r 1 of the Rules to transfer proceedings in one court to another court of co-ordinate jurisdiction?

[38] It is not uncommon to encounter applications being made by a party for two or more causes or matters filed in two or more different courts to be consolidated either for the same to be tried at the same time or one immediately after another.

[39] Order 4 r 1 stipulates the tests that the court must be satisfied before making such a consolidation order. Rule 1 starts with the words 'Where two or more causes or matters are pending …'. It does not at all state anywhere that the two or more causes or matters must be pending before the same court. Hence, the contention by learned counsel of the plaintiff that r 1 applies only to pending causes or matters in a particular court is not borne out by the wordings of r 1. Indeed, there is no reason at all to limit the application of O 4 r 1 to just causes or matters pending before a particular court.

[40] The Court of Appeal in *Osaka Resources Sdn Bhd & Ors v Foo Holdings Sdn Bhd and another appeal* [2014] 1 MLJ 461 at p 469 stated that '[I]t is trite that the main purpose of consolidation is to save costs, time and effort, and to make the conduct of several actions more convenient by treating them as one action'.

[41] Since the main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient, surely such a purpose should not be restricted to only causes or matters that are pending before a particular court. I hold that O 4 r 1 should not be read so restrictively as contended by learned counsel of the Plaintiff. A plain reading of O 4 r 1 would permit a judge of the High Court to make an order for two or more causes or matters that are pending to be consolidated even if these causes or matters are pending in different courts as long as the requisite tests are satisfied.

[42] Although there is no mention in O 4 r 1(1) of any power to transfer the causes or matters from one court to another court, the power to transfer is consequential from the order for consolidation. The power for the transfer is vested in the High Court under para 12 of the Schedule of the CJA. This is made clear when one reads r 1(3) of O 4 which states:

> (3) Upon such order being made, the file of the cause or matter in which the application is made shall be transferred to and added to the file of such other cause or matter, and the copy of the order shall be left in place of the file so transferred, and a memorandum of the transfer shall be entered in the cause book against the cause or matter so consolidated.

[43] In fact, Justice Mary Lim (as she then was) in *Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd and ors* [2010] MLJU 1854 had stated clearly that an application for consolidation 'Order 4 rule 1 of the Rules of the High Court 1980'.

[44] Her Ladyship also did not think that the consolidation of proceedings is limited only to proceedings before the same court. At para 15 of her judgment, she commented thus:

> [15] Therefore, the general rule is that proceedings will not be consolidated, even if those proceedings were before the same court; what more if the proceedings are in different courts and occurring over a space of time.

[45] More recently, in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd* [2019] 2 MLJ 816 the Court of Appeal expressly rejected the argument that O 4 does not permit the transfer of cases and that only cases before the same High Court can be transferred. Rhodzariah Bujang JCA at p 823 of the report held as follows in allowing two actions filed in different divisions of the High

Court to be consolidated:

> [11] As for the argument that only cases before the same High Court can be transferred, with respect we are unable to accede to the same. O 57 of the Rule of Court 2012 on transfer of proceedings does not come into play in the factual matrix of this case although it cannot be denied that the natural consequence of the consolidation order when allowed would result in one case being transferred to the other court and heard by the same judge. Order 57 r 1(1) caters specifically for cases where, for instance, a case in the Kuala Lumpur High Court would be more expediently heard in the High Court in Shah Alam. In this appeal, both cases were filed in the High Court of Kuala Lumpur but in different divisions, cannot stand in the way of the all important consideration as stated in Central Securities for these different divisions were created to streamline the courts for a more expeditious and efficient disposal of cases but not to create an obstacle or a hindrance against genuinely deserving cases filed in different divisions.

[46] Hence, based on the above reasons, I dismissed the objection raised by learned counsel of the plaintiff to the application by the defendant under O 4 r 1.

[47] I will now turn to the merits of the application, namely, whether the defendant has satisfied the prerequisites under O 4 r 1(1) for an order to have the OS action and the writ action to be consolidated.

THE OS ACTION

[48] The subject matter of the OS action that was filed on 3 April 2019 is a trust deed dated 19 June 2015 ('the Maybank trust')

[49] The defendant is the trustee to the Maybank trust. He had applied for and obtained from Malayan Banking Bhd a share margin financing facility ('the Maybank facility') in his name and had agreed to utilise the Maybank facility to invest in securities and to hold the investments in trust for the plaintiff. The Maybank facility was secured by a fixed deposit of RM14,695,588.15 provided by the plaintiff.

[50] In the OS action, the plaintiff is seeking from the defendant the following reliefs:

(a) quarterly reports on the investments, purchases, sales, trading in shares and or securities and the net position of the investments/assets under the Maybank trust commencing from the first quarter of the opening of the Maybank facility;

(b) a true, full and detailed account of:

    (i) all investments, purchases, sales, trading in shares and/or securities

conducted by the defendant, his agents and or proxies including but not limited to the details of each investment, purchase or sale of the shares and or securities;

(ii) all benefits, dividends and or gains received by the defendant, if any, from the date of the opening of the Maybank facility;

(iii) the current value of the investments under the Maybank trust;

(iv) a true, full and detailed account of all sums received by the defendant, his agents and or proxies including but not limited to the proceeds of sale of shares, dividends arising from or in connection with the utilisation of the share margin facilities in respect of the Maybank share trading account; and

(v) a true, full and detailed account of the funds in the fixed deposit belonging to the plaintiff including but not limited to an account of all interest accrued.

[51] These reliefs are confined to the Maybank trust. The OS and the affidavit in support have been served on the defendant. No affidavit in reply has been filed by the defendant pending the determination of this application,

[52] During oral submission, learned counsel of the defendant stated that the defendant does not dispute his appointment as the trustee to the Maybank trust. However, the defendant contends that he had already provided the plaintiff with the necessary accounts and documents with invitation extended for clarifications. The defendant is seeking to retire as the trustee and to be exonerated of his liability to Maybank facility.

THE WRIT ACTION

[53] The subject matters in the writ action which was filed on 31 March 2019 are in relation to three trust deeds, namely:

(a) trust deed dated 19 June 2015 (which is the Maybank trust);

(b) trust deed dated 24 November 2016 ('the CIMB trust'); and

(c) supplemental trust deed dated 5 July 2019.

[54] In the statement of claim, the defendant alleged, inter alia, that:

(a) the plaintiff is obliged to exonerate and indemnify the defendant for liabilities incurred for the investments under the Maybank facility and the defendant's other margin trading facility with CIMB Bank Bhd ('CIMB facility');

(b) the defendant had advanced a sum of RM9,554,325 to acquire shares on behalf of the plaintiff; and

(c) the plaintiff had harassed the defendant by oppressively and unacceptably creating alarm and distress to the defendant by insinuations of impropriety and or breach of trust.

[55] Learned counsel of the defendant submitted that the OS action and the writ action ought to be consolidated as they bear an overlap on the investments undertaken under the trust deeds. Also, the reliefs sought in the writ action include an account of sums due to the defendant after the selling down or disposal of the remaining investments and or the encashment of the fixed deposit toward retiring the Maybank facility and the CIMB facility.

[56] Learned counsel of the defendant contended that a consolidation of both the matters before a single judge would:

(a) avoid different decisions by two different courts; and

(b) save substantial time and costs.

It was also submitted that the documents that will be filed for the writ action will also be filed for the OS action and that the witnesses will be common for both the actions.

[57] In opposing the application, learned counsel of the plaintiff submitted that there are in fact no common question of law or facts at all between the two matters.

[58] The OS action deals only with the Maybank trust and does not deal at all with the CIMB trust deed and or the supplemental trust deed dated 5 July 2017. The reliefs sought in the OS action are for an account of the investments made under the Maybank trust whereas the writ action seeks for exoneration and indemnification of all liability arising under the three trust deeds which are distinct and separate from the historical account sought in the OS action.

[59] Even the 'account' sought for under the writ action, if granted, will be an account to be taken upon the retirement of the trusts and is not the same as the historical account sought for from the defendant in the OS action.

[60] Further, learned counsel of the plaintiff contended that the OS action, being an action that can be determined on affidavits without the necessity to call for oral evidence, if consolidated with the writ action, will run contrary to the very purpose of O 4 r 1, ie saving time and costs as the OS action can be proceeded with expeditiously and the writ action which requires a trial will

delay the OS action. In support, counsel of the plaintiff referred to *Five Star Heritage Sdn Bhd v Nai Ninn Sararaksh & Anor* [2017] MLJU 1666, *Shankar a/l Ram Pohumall @ Shankar RP Asnani & Anor v Jeffery Law Siew Su & Ors* [2010] 4 MLJ 788 and *Premier Model (M) Sdn Bhd v Phileo Promenade Sdn Bhd & Anor* [2000] 1 MLJ 364.

[61] There is no risk of inconsistent judgments if the OS action is heard separately from the writ action because the issues and the reliefs sought for in the OS action are different from the writ action. Learned counsel of the plaintiff cited the decision of Dato' Kang Hwee Gee in *Alliance Bank (M) Bhd v Portola Closure Manufacturing (M) Sdn Bhd and Others* [2007] MLJU 206; [2007] 1 LNS 112 where His Lordship stated as follow:

> The present action is purely a recovery of monies which the bank had lent to the first defendant of which the second and third defendants were guarantors. The loan agreement and so were the letters of guarantee expressed to bind the guarantors specifically to the performance of the first defendant.
>
> The plaintiff should be able in all fairness to pursue its claim against the defendants independently of the other claims in the other courts.
>
> The defendants should be able to raise any defence in this actions as they may in the actions in the courts including the defence of estoppels either as an individual or a group. This should not prejudice the defendants in any way whether it is raised here in this court and raised here in this court and raised again repeatedly in the other courts.
>
> The submission that there is a possibility of one court arriving at a different finding and decision should not be an issue. In making any decision a court would not act per incurim of the judgment that may have been made earlier on issues which it considers relevant. It would have to consider that judgment decided earlier before arriving at a decision.

[62] According to learned counsel of the plaintiff, he only knew of the defendant's writ action after the service of the writ and statement of claim on him at 3.40pm on 5 April 2019. By this time the plaintiff had already served the OS action on the defendant's solicitors at 3.20pm on the same day. He therefore submitted that there was no abuse in the plaintiff filing the OS action subsequent to the writ action as contended by learned counsel of the defendant.

[63] Based on the aforesaid facts, learned counsel of the plaintiff distinguished the facts in the cases of *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290, *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 and *Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686 cited by learned counsel of the defendant in support of his contention that the plaintiff had abused the court process by filing the OS

action subsequent to the writ action and insisting on a parallel instalment litigation. A

[64] After considering the arguments and the cause papers, I am of the opinion that the defendant's application under encl 5 ought to be dismissed. B

[65] The defendant's application to have the OS action to be 'listed' with the writ action with 'further directions to be reserved for the Judge having conduct of the 1st Suit and the 2nd Suit to thereafter decide on the appropriate directions pursuant to Order 4 Rule 1 of the Rules' is premised on O 4 r 1(1) of the Rules. C

[66] Order 4 r 1 stipulates the conditions to be satisfied for the court to order any causes or matters to be consolidated. It does not provide for an order to 'list' any causes or matters at all. I agree with learned counsel of the plaintiff that the defendant's application is technically flawed. D

[67] In any case, even proceeding on the basis that the application is one for consolidation of the OS action with the writ action, I am not satisfied that the defendant has fulfilled any of the conditions described in O 4 r 1 at all. E

[68] In *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 at p 251, the Federal Court held that:

> The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions 'to render it desirable that the whole should be disposed of at the same time' (*Payne v British Time Recorder Co*, *Horwood v. British Statesman Publishing Co Ltd*, *Daws v Daily Sketch*). F G

[69] There is no common question of law or facts between the OS action and the writ action to merit a consolidation. The questions of law in the OS action is confined to the Maybank trust and they pertain to the issue of compelling the defendant to give a historical account of the investments made and the fixed deposit that was pledged. H

[70] On the other hand, the questions of law in the writ action are:

(a) whether the defendant is entitled to be exonerated and indemnified for the margin trading facilities under the Maybank facility and the CIMB facility; I

A (b) whether the defendant had made personal advances to the plaintiff and the related question whether the plaintiff is obliged to indemnify the defendant in respect of the said advances;

(c) whether the plaintiff had failed, refused and or neglected to give effect to the defendant's resignation as trustee under the three trusts;

B

(d) the determination of the remaining investments under the three trusts;

(e) the right of the defendant to dispose or encash the fixed deposit pledged and for an account to be taken thereafter; and

C (f) whether the plaintiff had acted oppressively against the defendant and whether the defendant is entitled to damages.

[71] The rights to the reliefs claimed in the OS action also are not in respect of or arise out of the same transaction or series of transactions.

D

[72] The reliefs for the historical accounts in the OS action relate to investments that had been made by the defendant under the Maybank facility. On the other hand, the reliefs sought for in the writ action relate to the defendant's rights under the three trusts to be exonerated and indemnified and to resign as trustee with the consequential accounts to be taken following the closing of the trusts.

E

[73] In other words, the transactions giving rise to the reliefs claimed in the OS action are the investments in securities undertaken by the defendant pursuant to the share margin financing facility obtained from the Maybank facility. What is sought for is an account of these investments.

F

[74] In the writ action, the relevant transactions giving rise to the reliefs claimed relate to the creation of the trust deeds and the determination of the parties' respective rights and obligations thereunder. Other relevant transactions are the personal advances made by the defendant and the closing of the three trusts with an account to be taken after the final disposal of the remaining investments and or the fixed deposits.

G

H

[75] Given that the questions of law or facts are different and that the relevant transaction or series of transactions giving rise to the reliefs claimed are also different, there is no real basis for the OS action and the writ action to be consolidated.

I

[76] Even though there is a sharing of a common subject matter, namely the Maybank trust, this alone is not a sufficient ground for an order to consolidate the two matters. In fact, because the reliefs sought for in the OS action are for an historical account of the investments made under the Maybank trust, an

expeditious disposal of the OS action may assist the parties in the writ action.

[77] The OS action proceeds by way of affidavits and does not require oral evidence adduced at a trial. It can be determined fairly quickly. This is distinct from the writ action where oral testimony will need to be adduced. There will be no saving of time and costs by consolidating the two actions. The OS action can be and ought to be pursued independently of the writ action.

[78] There is also no possibility of inconsistent judgments if the OS action is heard separately and independent of the writ action since the issues and the reliefs claimed are different and distinct.

[79] The defendant has not shown that there are some other reasons to make it desirable to make an order for consolidation under O 4 r 1(1)(c).

[80] On the question of abuse of court process, I agree with counsel of the plaintiff that the factual matrix in the cases cited by counsel of the defendant are wholly different from our present case. The plaintiff's instituting of the OS action without the knowledge of the writ action cannot be an abuse of process. What is more is that the two actions are clearly distinct.

[81] For the reasons above, I dismissed the application by the defendant in encl 5 with costs fixed at RM5,000.

Enclosure 5 dismissed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar